

NO. 46969-3-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

KARL S. HANNA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR CLARK COURT  
The Honorable Suzan Clark, Judge  
Cause No. 13-1-01994-9

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in imposing an exceptional sentence.
02. In imposing an exceptional sentence, the trial court erred in entering the jury's finding of fact that Hanna used a position of trust to commit the crime.
03. In imposing an exceptional sentence, the trial court erred in entering the jury's finding of fact that there was an ongoing pattern of sexual abuse of a minor.
04. In imposing an exceptional sentence, the trial court erred in entering the conclusion of law that the sentence is consistent with the aggravating factors found by the jury.
05. In imposing an exceptional sentence, the trial court erred in entering the conclusion of law that the sentence is consistent with the aggravating factors found by the court.
06. The trial court erred in giving Jury Instruction 18 defining "prolonged period of time" that impermissibly commented on the evidence in violation Art. 4, Sec. 16 of the Washington Constitution and relieved the State of its burden to prove this factor.

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07. There was insufficient evidence to support the jury's special verdict that there was an ongoing pattern of sexual abuse of a minor.
08. There was insufficient evidence to support the jury's special verdict that Hanna used a position of trust to facilitate the crime.
09. The trial court erred in imposing an exceptional sentence where any one of the aggravating factors relied upon is invalidated.
10. The trial court erred in permitting Hanna to be represented by counsel who proposed defense instruction D19 that defined "prolonged period of time" to mean more than a few weeks.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in imposing an exceptional sentence where Jury Instruction 18 defined prolonged period of time in a manner that impermissibly commented in the evidence in violation of Art. 4, Sec. 16 of the Washington constitution?  
[Assignments of Error Nos. 1, 3, 4, 5, 6, 7, 9].
02. Whether the trial court erred in imposing an exceptional sentence where there was insufficient evidence to support the jury's special verdict that there was an ongoing pattern of sexual abuse of a minor?  
[Assignment of Error Nos. 3, 7].

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03. Whether the trial court erred in imposing an exceptional sentence where there was insufficient evidence to support the jury's special verdict that Hanna used a position of trust to facilitate the crime?  
[Assignment of Error Nos. 2, 8].
04. Whether the trial court erred in imposing an exceptional sentence where any one of the aggravating factors relied upon is invalidated?  
[Assignment of Error No. 9].
05. Whether Hanna was prejudiced as a result of his counsel's proposing defense instruction D19 that defined "prolonged period of time" to mean more than a few weeks?  
[Assignment of Error No. 10]

C. STATEMENT OF THE CASE

01. Procedural Facts

Karl S. Hanna was charged by information filed in Clark County Superior Court October 29, 2013, with five counts of child molestation in the first degree, contrary to RCW 9A.44.083. Each count further alleged the aggravating circumstances of particular vulnerability, ongoing pattern of sexual abuse and violation of position of trust, contrary to RCWs 9.94A.533(3)(b),(g),(n). [CP 1-4]. Count V was dismissed prior to conclusion of trial, as was the aggravating factor of particular vulnerability. [RP 302-03].

Hanna's pretrial statements were ruled admissible following a CrR 3.5 hearing [RP 122-23], and trial to a jury commenced October 20, 2014, the Honorable Suzan Clark presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 303, 312]. Hanna was found guilty, including aggravating factors, given an exceptional sentence of 220 months,<sup>1</sup> and timely notice of this appeal followed. [CP 85-93, 97, 115].

02. RCW 9A.44 Hearing

By December 2012, Christina Dean had been separated from Blake Steeper for approximately six years, during which time they shared custody of their daughter L.S. [RP 7-9]. Steeper lived with several people including Hanna. [RP 9-10]. In late November or early December, L.S. called her mother into her bedroom, saying she had something to tell her. [RP 11].

She was upset.

....

She just told me that Karl was toughing her - - I'm sorry - - that it had happened several times. She didn't give me specifics, so I really don't know a lot....

[RP 11].

[S]he said her privates and then she showed me down there.

[RP 11-12].

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<sup>1</sup> In imposing the exceptional sentence, the sentencing court also found that "the defendant committed multiple offenses and the defendant's offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c)." [CP 93].

I have never asked her specifics and she's never just come out and said, like, the scenario of what happened.

[RP 12].

She told me (the touching was) over the clothes.

[RP 14].

Now 10-year-old L.S. (DOB 02/25/04) testified that when visiting her dad's house, Hanna would rub her vagina over her pants while she was sitting on his lap on the couch in the basement. [RP 22, 26, 29]. "He would rub it." [RP 30]. This happened more than once. [RP 30]. Once it happened when she and her cousin were watching a movie on Netflix. [RP 30]. He also touched her in his truck on more than one occasion, once when they went to the store and once when they went swimming. [RP 32, 35-36, 38].

In January 2013 [RP 99], Detective Jennifer Hubenthal conducted a forensic interview with then eight-year-old L.S., an audio/video copy of which was admitted as State's Pretrial Exhibit 1. [RP 106]. During the interview, L.S. talked about staying at her dad's house where Hanna lived downstairs in the basement. [RP 56-57]. She related four incidents, all the same, where Hanna would rub her front private over her pants. [89]. Twice on the couch downstairs while watching TV [RP 75-77, 80-81, 95] and twice in his truck, once while driving to Minit Mart and once when

they were going to Kids Club. [RP 83-85, 92]. It all happened when she was 8 and in the third grade. [RP 97].

Kelly Lash, a child and family therapist [RP 61], counseled L.S. about emotional healing, “[t]alking around the - - abuse, yes.” [RP 67]. They meet “[e]very week to two weeks.” [RP 67]. About 15 times, “give or take.” [RP 61]. Lash had L.S. write a “trauma narrative, which is describing the details of the abuse.” [RP 61]. In the narrative, admitted as State’s Pretrial Exhibit 2 [RP 63], L.S. wrote that Hanna “did things bad and it was bad, and he rubbed my private and that was bad, and I was scared. I was scared to talk to my dad because sometimes he didn’t believe me.” [RP 63]. The only details L.S. provided were at the first intake appointment and in the note she had written. [RP, 64 67].

Reviewing the factors set forth in State v. Ryan, 107 Wn.2d 165, 691 P.2d 197 (1984), the court ruled that statements made by L.S. to her mother, Detective Hubenthal, and her counselor would be admissible under RCW 9A.44.120. [RP 103-05; CP 60-61]. Additionally, L.S.’s statements to her counselor would be admissible “for purposes of medical diagnosis or treatment....” [RP 105].

### 03. Trial

Blake Steeper, L.S.’s father, separated from Christina Dean, L.S.’s mother, about 2007. [RP 150]. In 2012, he resided with his

older cousin Dominick Zook and his wife Yvonne and their two children, T.Z. and N.Z. Hanna also lived at the residence. [RP 151-52]. The house had three floors. The Zook's lived upstairs with their two children, Hanna lived downstairs, and Steeper slept in the living room on a futon. [RP 153]. L.S. and her brother Andrew visited "[u]p to every weekend." [RP 153]. When asked if his children spent much time with Hanna, Steeper responded, "On and off, yes." [RP 154]. On several occasions, Hanna would take "two to four" of the children to various places: local park, local convenience store for a snack, Kid Zone. [RP 154-55]. Steeper never noticed any inappropriate behavior between Hanna and his daughter. [RP 157].

Christina Dean testified consistent with her pretrial testimony, adding that L.S. told her "that it happened during watching movies downstairs [RP 166](,)" and that "(T.Z.)" and other children were there at one point. [RP 171]. "She said that she wasn't a hundred percent sure, but there was a time when she thought she saw (Hanna) try to touch (T.Z.), and (T.Z.) screamed." [RP 173].

Consistent with her pretrial testimony, Detective Hubenthal related that she interviewed L.S. on January 11, 2013. A redacted<sup>2</sup> audio/video

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<sup>2</sup> The video was redacted to eliminate questions and answers concerning L.S.'s competency. [RP 184-85].

copy was played to the jury, the relevant portions of which are set forth in Hubenthal's pretrial testimony, supra at pages 5-6. [RP 189-230].

Similarly, Kelly Lash, L.S.'s counselor, testified consistent with her pretrial testimony, again reading the note L.S. had written alleging Hanna had rubbed her private. [RP 259].

As she did at the pretrial hearing, L.S. testified that Hanna rubbed her private ("Where you go pee.") over her clothing with his hand. [RP 242-43]. She thought it might have happened more than two times while she was watching TV downstairs [RP 244-45], and twice in Hanna's truck, once when he was taking L.S. and her friends to go swimming and once when they went to the Minit Mart. [RP 247]. This happened in the truck when L.S. was sitting in the front seat between Hanna and her friend T.Z.. [RP 246]. Contrary to her interview with Detective Hubenthal, L.S. said these events occurred when she was 9 and in the fourth grade.<sup>3</sup> [RP 250].

When Detective Hubenthal interviewed Hanna, he denied touching L.S.'s privates and acknowledged that he had watched TV with the kids and had taken them to the places mentioned by L.S. [RP 267-69].

He denied touching privates. But he said that there was touching. He touched (L.S.'s) knee in the car. He admitted that (L.S.) sat on his lap on the couch downstairs and he would put his arm around her and toughed her in that way.

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<sup>3</sup> In her interview with Detective Hubenthal January 11, 2013, L.S. claimed that everything had happened when she was 8 and in the third grade. [RP 239].

[RP 268].

He said it was - - he was just kind of like being nice. He said he drove one-handed and so it was just kind of comfortable. He'd put his hand on her knee. And he described it as he was just trying to be nice.

[RP 268].

Fifty-four-year-old Karl Hanna denied inappropriately touching L.S., either on the couch or in his truck. [RP 335-36, 341]. He admitted that he might have put his hand on L.S.'s knee while driving, explaining it was an innocent gesture, "like, patting her on the head." [RP 388]. "I wasn't, like, wanting my hand on her knee or nothing." [RP 340]. In response to the prosecutor's question if he had known L.S. "a couple of months, basically?" Hanna said yes. [RP 341].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN IMPOSING AN EXCEPTIONAL SENTENCE.

When reviewing the imposition of an exceptional sentence, this court must engage in a three-part analysis, which includes (1) making a factual inquiry to determine whether the record supports the sentencing judge's reasons or the jury's special verdict on the aggravating circumstances under a clearly erroneous standard; (2) determining, as a matter of law, whether the reasons given for imposing

the sentence are substantial and compelling; and (3) determining whether the sentence is clearly too excessive or clearly too lenient under the abuse of discretion standard. State v. Fowler, 145 Wn.2d 400, 405-06, 38 P.3d 335 (2002). A jury finding of one of the listed aggravating factors in RCW 9.94A.535(3) can serve as a substantial and compelling reason to to impose an exceptional sentence.

Hanna was given an exceptional sentence based upon the following:

#### I. FINDINGS OF FACT

The jury found by interrogatory the defendant used a position of trust to facilitate the crime. RCW 9.94A.533(3)(n).

The jury also found by interrogatory the defendant (sic) there was an ongoing pattern of sexual abuse of a minor. RCW 9.94A.533(3)(g).

☒ The court finds the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. RCW 9.94A.535(2)(c).

#### II. CONCLUSIONS OF LAW

The court finds an exceptional sentence is consistent with the aggravating factors which were found by the jury by special verdict.

☒ The court finds an exceptional sentence is consistent with the aggravating factors which were found by the court.

[CP 93].

01.1 On-going Pattern of Sexual Abuse

Under RCW 9.94A.525(3)(g), a jury may

find an aggravating factor if:

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

An “ongoing pattern of sexual abuse” was defined by Jury

Instruction 18:

An ‘ongoing pattern of sexual abuse’ means multiple incidents over a prolonged period of time. The term ‘prolonged period of time’ means more than a few weeks. (emphasis added).

[CP 82].

Art. 4, Sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses. State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900). The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge’s opinion from influencing the jury. State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986). And while a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he or she may,

for the first time on appeal, argue that an instruction was an improper comment on the evidence. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); RAP 2.5(a)(3).

The purpose of prohibiting judicial comments on the evidence is to prevent the trial judge's opinion from influencing the jury. State v. Hansen, 46 Wn. App. at 300. A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. Id. The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court has been communicated to the jury. State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977).

During closing, the prosecutor argued:

A prolonged period of time is a matter of weeks.

So we know that this happened on at least four occasions.  
So that is a pattern of abuse ....

[RP 374].

Recently, in State v. Brush, 2015 WL 4040831 (July 2, 2015), our Supreme held that a jury instruction defining "prolonged period of time" to mean "more than a few weeks" constitutes an improper comment because it essentially tells the jury that abuse occurring for more than two

weeks satisfies this definition. Citing State v. Barnett, 104 Wn. App. 191, 203, 16 P.3d 74 (2001), the court went on to note that the Barnett court “reviewed three prior Court of Appeals cases and concluded that they ‘suggest[ed] that years are required’ in order to find a ‘prolonged period of time.’” (citations omitted). Brush, 2015 WL 4040831, at \*17.

Here, Jury Instruction 18 informed the jury, as a matter of law, that more than a few weeks was a prolonged period of time. [CP 82]. The jury was further instructed that the charging period for each count was sometime between February 25, 2012 and December 20, 2012. [CP 74-77]. Dominick Zook testified that L.S.’s father lived at his residence for approximately six months when L.S. would visit on the weekends. [RP 153, 325]. And little can be gleaned from L.S.’s testimony as to the duration of the alleged abuse.

Once it has been demonstrated that a trial judge’s conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Whether a period of time is prolonged is a question of fact for the jury to decide. Since Jury Instruction 18 resolved that question for them, it was a comment on the evidence. A comment on the evidence is a constitutional error that is presumed harmful unless the State proves the error was harmless. State v. Levy, 156 Wn.2d at 725. An error of

constitutional magnitude is considered harmless if the opposing party establishes harmlessness beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967). Given this and the prosecutor’s argument that a prolonged period is but “a matter of weeks,” it cannot be seriously argued that Hanna was not prejudiced by this error, with the result that this ground for his exceptional sentence cannot be sustained.

#### 01.2 Violation of Position of Trust

Under RCW 9.94A.525(3)(n), a jury may find an aggravating factor if:

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

Abuse of a position of trust is a statutory aggravating factor that cannot be used to support a sentence outside the standard range unless the defendant actually was in a position of trust, and the position of trust was used to facilitate the commission of the offense. State v. Vermillion, 66 Wn. App. 332, 832 P.2d 85 (1992), review denied, 120 Wn.2d 1030 (1993). “Whether the defendant is in a position of trust depends on the length of the relationship with the victim, the trust relationship between the primary caregiver and the perpetrator of a sexual offense against a child, the vulnerability of the victim to trust because of age, and the degree

of the defendant's culpability." Vermillion, at 348. When analyzing abuse of trust, the focus is on the defendant. State v. Bedker, 74 Wn. App. 87, 95, 871 P.2d 673, review denied, 123 Wn.2d 1019 (1994).

Hanna did not abuse a position of trust. He was not L.S.'s caregiver, they spent little time together other than watching TV with the other kids and going to the local convenience store and park, again with the other kids. There was little evidence of a one-on-one relationship nor any indication of particular vulnerability on L.S.'s part.<sup>4</sup> Simply, Hanna was not in a position of trust: the two had not been close for any appreciable period, Hanna was not a caregiver, and it cannot be argued that L.S. was particularly vulnerable to trust Hanna. See State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) (relationship's duration and degree used to determine whether defendant abused position of trust). Here, there was no degree of culpability greater than that involved in the commission of the crimes for which Hanna was convicted. The jury's finding does not justify an exceptional sentence based on abuse of trust.

### 01.3 Remand for Resentencing

Hanna's standard sentence range was 140-198 months for each count. [CP 96]. The trial judge imposed an

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<sup>4</sup> Though "particular vulnerability" was initially alleged as an aggravating factor [CP 1-4], it was dismissed prior to the conclusion of the trial when the prosecutor advised the court "that I'm also striking the aggravator of vulnerable victim..." [RP 302].

exceptional sentence of 220 months for each count, with all counts to be served concurrently [CP 97-98], explaining that “[i]n light of the three factors, I do believe that the 220 months is an appropriate sentence....” [RP 405].

Where some but not all of the aggravating factors upon which the trial court relied are invalidated, this court must remand for resentencing unless it is satisfied that the trial court would have imposed the same sentence absent consideration of the improper grounds. State v. Bedker, 74 Wn. App. at 100; State v. Drummer, 54 Wn. App. 751, 760, 775 P.2d 981 (1989). Though the record is silent on the relative weight given each factor by the trial court, the court did seem to indicate it was the collective impact of the three aggravating factors that justified the exceptional sentence. See State v. Fisher, 108 Wn.2d 419, 429-30 n.7, 739 P.2d 683 (1987). Nor did the court indicate that it would impose the same duration upon any single factor. State v. Negrete, 72 Wn. App. 62, 71, 863 P.2d 137 (1993). As such, if any one of the aggravating factors is invalidated, remand for resentencing is warranted.

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02. HANNA WAS PREJUDICED AS A  
RESULT OF HIS TRIAL COUNSEL  
PROPOSING DEFENSE INSTRUCTION  
D19 THAT DEFINED PROLONGED  
PERIOD OF TIME TO MEAN MORE  
THAN A FEW WEEKS.

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not

required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)); RAP 2.5(a)(3).

Citing WPIC 300.16, Hanna proposed the following defense instruction D19:

INSTRUCTION NO. D19

An “ongoing pattern of sexual abuse” means multiple incidents of abuse over a prolonged period of time. The term “prolonged period of time” means more than a few weeks.

[CP 31].

Should this court find that trial counsel waived the issue relating to Jury Instruction 18 by inviting error in proposing the above instruction, which is identical to Jury Instruction 18, both elements of ineffective assistance of counsel have been established.

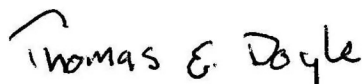
First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have proposed this instruction, which amounted to an unconstitutional comment on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution, as previously set forth, supra at pages 11-14.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here, as previously set forth, supra at pages 13-14, is self-evident.

E. CONCLUSION

Based on the above, Hanna respectfully requests this court to remand for resentencing

DATED this 22<sup>nd</sup> day of July 2015.



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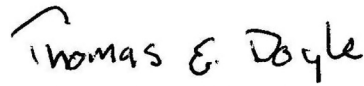
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 22<sup>nd</sup> day of July 2015.

A handwritten signature in black ink that reads "Thomas E. Doyle". The signature is written in a cursive style with a large initial 'T'.

THOMAS E. DOYLE  
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## DOYLE LAW OFFICE

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- ☐ Affidavit
- ☐ Letter
- ☐ Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Petition for Review (PRV)
- ☐ Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: [ted9@me.com](mailto:ted9@me.com)

A copy of this document has been emailed to the following addresses:

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